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No. 87-120

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

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DALE FOLTZ, PETITIONER

-vs-

JONATHON HOPSON, RESPONDENT

---

# ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## B. INDEX OF AUTHORITIES


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## C. STATEMENT OF CASE

On June 9, 1981, after a five (5) day jury trial which included the testimony of 15 witnesses and the introduction of 24 exhibits, Respondent Jonathon Hopson was convicted of Second-Degree Murder in violation of MCLA 750.317 and Possession of a Firearm in Commission of a Felony contrary to MCLA 750.227(b). The original charge against Respondent was First-Degree Murder in violation of MCLA 750.316 and the firearm count, however, the jury returned a verdict for the lesser included offense of Second-Degree Murder. On June 24, 1981, Respondent was sentenced to life imprisonment for Second-Degree Murder and he received a two (2) year sentence for Felony Firearm. On January 27, 1983, the Michigan Court of Appeals, in an unpublished per curiam opinion, affirmed Respondent's conviction for Second-Degree Murder but vacated the fire arm conviction. People v. Jonathon Hopson, Docket No. 60184 (January 27, 1983). On November 30, 1984, the Michigan Supreme Court denied Respondent's Delayed Application for Leave to Appeal, however, Justice Levin, writing separately, voted to grant leave to appeal Respondent's conviction to consider whether there was sufficient evidence that Respondent "participated in a concert action to murder". People v. Jonathon Hopson, Docket No. 71063 (November 30, 1984).

On January 22, 1985, while being incarcerated in the state prison of Southern Michigan at Jackson, Respondent filed a Petition Under 28 U.S.C. 2254 for Writ of Habeas Corpus by a person in state custody. The in pro per Petition raises one and only ground in support of the granting of the Petition, that is,

that Respondent's conviction for Second-Degree Murder was "founded upon insufficient evidence" specifically, "the trial record; does not support any evidence in terms of the essential elements of the criminal offense, or as an aider and abettor as defined by state law, which could justify any rational trier of facts in concluding guilt beyond a reasonable doubt". Petition for Writ of Habeas Corpus, Section 12(A), p. 5. On February 26, 1985, the Wayne County Prosecutors Office responded to Mr. Hopson's Petition by filing an Answer to Petition to Writ of Habeas Corpus and Brief in Support. On January 10, 1986, pursuant to its Memorandum Opinion and Order Denying Petitioner's Application for Writ of Habeas Corpus of that same day, the Honorable George LaPlata enter Judgment and only judgment denying Petitioner's Writ of Habeas Corpus. On February 10, 1986, Respondent filed his in pro per Notice of Appeal from Judge LaPlata's Judgment of January 10, 1986. On that day also, Respondent filed a Petition for Certificate for Probable Cause which was denied by Judge LaPlata on February 14, 1986 pursuant to his Memorandum Opinion and Order.

Subsequently, Respondent sought review of the denial of his Petition for Writ of Habeas Corpus from the Sixth Circuit Court of Appeals. After briefs were submitted by the respective parties and oral argument was conducted, on May 20, 1987 the Court of Appeals in a per curiam decision reversed the district court and granted Respondent's Writ of Habeas Corpus. Petitioner now seeks this Honorable Court's review of the Sixth Circuit's decision. The pertinent facts are as follows.

In the early morning hours of October 10, 1979, Alfred Hagwood, also known as the "Wolfman", suffered a fatal shotgun wound to the right side of his body. [T1, p. 140] According to the coroner that performed the autopsy later that day, the fatal wound to the deceased was inflicted by a single shotgun shell that had been fired at least 15 feet away from the victim. [T1, p. 143, 148] The victim's blood alcohol content at the time of death was .24 with his urine alcohol level being at .29. [T1, p. 146] The coroner could not detect any evidence that the victim was involved in a struggle prior to his death. [T1, p. 151-152] With the shotgun wound on the victim being on the right side slightly toward the back, it was the opinion of the coroner that the deceased could not have been facing the shooter when the gun was fired. [T1, p. 152]

The one prosecution witness that claimed personal knowledge of the shooting was a woman named Elaine Faye Peterson. On the night of October 9, 1979, Ms. Peterson claimed that she went to the San-Zu-Zee Bar, located at the corner of East Jefferson and Hart, at approximately 9:30 or 10:00 o'clock that evening. [T4, p. 30-31] The purpose of Ms. Peterson's visit to the Bar that evening was to find a man named Gerald Marks to buy drugs from him. [T4, p. 31] She testified that she had lived in the area of Jefferson, Hart, Lykaste and Hillger for approximately 1 year and knew the victim, Alfred Hagwood, and Respondent prior to that evening. [T4, p. 26-28] She also testified that she knew a person named Fred Thompson who lived directly across the street from her on Lykaste and she attended a methadone clinic at Hart and Jefferson. [T4, p. 29-30]

Ms. Peterson stated that she stayed in the San-Zu-Zee Bar that evening for approximately 15-20 minutes and, during that time period, Respondent came in the bar with the "Twins", Ken and Keith Weaver. [T4, p. 32-33] She also stated that during the time period the victim, Wolfman, came in the bar. [T4, p. 33] At no time during her stay in the bar did she see Fred Thompson in the bar. [T4, p. 33]

The witness testified that while she was in the San-Zu-Zee Bar that evening, although the music playing was loud, she overheard an argument between Johnny Hopson, the Twins and the victim over a radio. [T4, p. 46] Although it was never made clear where she was with respect to the Respondent and the victim, she stated that she overheard some specifics of the argument about the radio, specifically, that the "Twins and Johnny" stated to the victim "he wouldn't need a radio where he was going". [T4, p. 46] The Twins and Respondent then left the bar and then the victim approached the witness and stated that "those punks took my radio". [T4, p. 34-35] Ms. Peterson could tell that the victim had been drinking and suggested to him that he should go home and forget about the radio. [T4, p. 35] The victim then left the bar with the witness following a couple of minutes thereafter. [T4, p. 35]

When she left the bar, the witness claimed that she heard further arguing about the radio between the victim and the Weaver Twins. [T4, p. 31a]* The witness initially testified that the

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*In Transcript 4, subsequent to p. 38, is another p. 29, thereafter continuing through p. 38 again. For the purpose of this appeal, Respondent has renumbered those second set of pages as 29a-38a.

Respondent did not say anything to the victim during this argument outside the Bar. However, when confronted with her prior testimony at preliminary examination by the assistant prosecutor, Ms. Peterson changed her story and stated that all three persons, that is, Respondent and the Weaver Twins, were arguing with the victim outside the bar. [T4, p. 32a-34a] On direct examination, Ms. Peterson again stated that during this argument outside the Bar, the Respondent "didn't have much to say", however, when confronted with the prior statement that the Respondent and the Weaver Twins had told the victim that "if he stayed there, he wouldn't ever see daylight", the witness agreed that the victim had been told that by the Respondent and the Twins, [T4, p. 35a-36a]

This part of the witness' testimony is crucial. On cross-examination, the witness stated that when she left the bar she saw only the victim standing outside alone and not arguing with anyone. [T4, p. 67, 68, 69, 70] Even on direct examination, the witness could not get her story straight as to when the alleged statement that "where he was going he wouldn't need a radio" was made, inside or outside the Bar. [T4, p. 34a] The witness also contradicted herself as to who made that statement to the victim in the Bar, originally saying that Respondent and the Twins made it but then later saying that it was only the Twins who made the statement in the Bar. [T4, p. 41]

After leaving the bar, Ms. Peterson then went to the house of Gerald Marks to find him to get her drugs. Mr. Marks lived in a basement apartment on Hillger, two blocks from the San-Zu-Zee

Bar. [T4, p. 37] She knocked on the door to Mr. Marks' house but, when no one answered, she left and walked back across Jefferson toward her home on Lykaste.

Once the witness crossed Jefferson to the riverside, she looked back and heard arguing in the area of the bank at the corner of Jefferson and Hillger Street. [T4, p. 38] She stated that she heard the Weaver Twins and Respondent again arguing about the radio and then saw Fred Thompson drive up in his green car, come out with a gun and then she heard shots fired. [T4, p. 45-46] Although Ms. Peterson stated that she heard Respondent arguing with the victim in front of the Detroit Bank & Trust branch, however, on cross-examination she stated that she did not hear the Respondent say anything. [T4, p. 73] Although the witness could not provide any testimony whatsoever as to the particulars of the shooting itself, she did say that Fred Thompson pulled up in his car alone to where Respondent, the Twins and the victim were standing. [T4, p. 71] She could not describe the gun, however, she could tell that the gun that was taken from the car by Thompson was a shotgun. [T4, p. 50] At no time during that evening had the witness seen the Respondent or the Weaver Twins in Mr. Thompson's car. [T4, p. 70] After hearing the shots, Peterson saw the victim run north on Hillger Street and then she turned and ran home, locked the door and went into her bedroom. [T4, p. 47, 82] She then looked out her window and saw Thompson drive up in his car across the street at his house and pull a sheet covering an object from the car and take it into the house. [T4, p. 48] This witness could offer no testimony as to what the Respondent or the Weaver Twins did after

the shots were fired. [T4, p. 97] She did state, however, that the first time that she saw Respondent, the Twins, the victim and Fred Thompson together that night was on the corner of Hillger and Jefferson in front of the Detroit Bank & Trust branch after she had gone to Gerald Marks' house to buy drugs. [T4, p. 91-92]

Arbura Brown was employed at the San-Zu-Zee Bar as a barmaid on October 9, 1979. [T2, p. 101] She came to work at approximately 5:30 p.m. that day and from approximately one hour later until closing, that is, 2:30 a.m. or 3:00 a.m., she was the only employee serving drinks in the Bar. [T2, p. 102-103] She got to know Respondent during the course of her employment at the Bar and on that date saw him come in at approximately 7:30 p.m. [T2, 102, 107] According to the former barmaid, Respondent argued with one Donald Massey in the Bar and then left at approximately 8:00 p.m. [T2, p. 107-108] Respondent returned to the Bar with one of the Weaver Twins and resumed his discussion with Massey. Ms. Brown's attention was then drawn to a man in a black leather jacket, later identified as the victim, sitting with his back to the bar, something that was prohibited by bar rules. [T2, p. 133-134, 112-114] While the man in the black leather jacket was seated at the bar, two men approached him and engaged in an argument causing the man in the black leather jacket to become very angry and curse them. [T2, p. 116] Apparently, Respondent had left the Bar by this time but then returned again with one of the Weaver Twins. [T2, p. 117] When Respondent returned he was smiling and laughing and asked Ms. Brown if she heard "the shots outside". [T2, p. 118] However,

according to Ms. Brown, Respondent, a frequent customer in the Bar, was a friendly person with a happy disposition who enjoyed joking a lot and maintained a smile on his face when he talked. [T2, p. 120-121] At no time during the period that Respondent was in the Bar that evening did he speak with anyone else besides Donald Massey. [T2, p. 125] Ms. Brown stated that neither Fred Thompson nor Elaine Faye Peterson were in the San-Zu-Zee Bar on October 9, 1979. [T2, p. 127-128]

Detroit police officer, Michael Scarborough got off of work at the Fifth Precinct near the corner of Jefferson and Hillger at 12:15 a.m. on October 10, 1979. [T2, p. 9] As he was walking to the rear of the Precinct to get on his motorcycle with another police officer, he heard a shotgun blast in the immediate vicinity and fell to the ground thinking that he was being shot at. [T2, p. 9-11] Scarborough heard three more shotgun blasts coming from the alley running parallel to Jefferson off of Hillger, directly east of where he was standing and, during that time, he actually saw a male figure standing in the alley with a shotgun. [T2, p. 13-14] Scarborough then saw a black male running north on Hillger. [T2, p. 15] He and his partner, with guns drawn, then gave chase north on Hillger toward Kercheval, one block east of Jefferson. [T2, p. 16-17] On the way up Hillger, Scarborough spoke with an off-duty Detroit police homicide detective who lived on Hillger, George Taylor. [T2, p. 19] Taylor told Scarborough the man had turned the corner at Kercheval. [T2, p. 20] Scarborough eventually caught up with the decedent on Kercheval where he was laying face down on the pavement, bleeding to death. [T2, p. 24-25]

George Taylor was off-duty on October 9, 1979 at his upper flat apartment at 1540 Hillger. [T3, p. 57-58] Shortly past midnight, he heard a shotgun blast come from the south of his house toward Jefferson. [T3, p. 58] After looking outside and not seeing anything, he then heard two more shotgun blasts closer to the house. [T3, p. 60-61] Taylor then obtained his service revolver and went out onto the front porch of the flat to see about his wife who had gone to the store for groceries. [T3, p. 63-64] Taylor observed a man in a long dark coat running down Hillger from the alley towards his wife. [T3, p. 63-64] After Taylor had let his wife in downstairs, Scarborough past and then Taylor noticed Respondent and one of the Weaver Twins walk out of the alley. [T3, p. 68]

According to Taylor, Respondent and the Weaver Twin walked past the sergeant's house and up to Respondent's house, kitty-corner across the street. [T3, p. 68-69] Taylor then observed Hopson and the Twin go up on the porch of Hopson's house across the street and hand something to a male person inside the house. [T3, p. 70-71] The detective could not tell what was being handed or which person was doing the handing, but he believed it appeared from the movements that something was being delivered to the person standing inside the door. [T3, p. 71-73]. The Respondent and the Twin then returned across the street towards Taylor's house. Taylor, who said it was common knowledge in the neighborhood that he was a homicide detective with the Detroit Police Department, then asked the two if they saw or heard anything to which "they" replied that they had heard shots but

didn't see "nothing". [T3, p. 73-74] Taylor is the only witness that can place Respondent and Fred Thompson together at any time during October 9, 1979. Although he did not see them together at any time during the night, he did see them earlier in the day at approximately 8:00 or 9:00 o'clock in the evening. [T3, p. 83, 88]

Testimony from the consensus of witnesses was that there was anywhere from 3 to 4 shotgun blasts within a short period of time. The police witnesses testified that the only type of shotgun capable of shooting in such rapid succession would be a pump-action shotgun which would eject the shotgun shells every time the gun was fired. All police officers that investigated the scene, that is, the alley off of Hillger by Jefferson could not find any discharged shotgun shells. It was the theory of the prosecution that the jury could infer that the objects that were handed into Hopson's house were the missing shotgun shell casings.

At the conclusion of the proofs, the jury was instructed on first and second-degree murder, aiding and abetting and felony firearm under Michigan law. The jury returned a verdict against Respondent of guilty of Second-degree Murder and Possession of a Firearm During the Commission of a Felony. Respondent was then sentenced to life imprisonment and still remains incarcerated to this day.

## D. SUMMARY OF ARGUMENT


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## E. ARGUMENT

Although Petitioner suggests that there are three (3) questions presented for review to this Honorable Court, in reality the sole issue to be determined is the propriety of the Sixth Circuit's granting Jonathon Hopson's Petition for Writ of Habeas Corpus under 28 USC 2254, that is, whether the evidence produced at Respondent's trial was sufficient to convince any rational trier of fact of Respondent's guilt beyond a reasonable doubt to Second-Degree Murder. Jackson v. Virginia, 443 U.S. 307; 99 S. Ct. 2781, 2791-2792; 61 L. Ed 2d 560 (1979). Respondent submits to this Honorable Court that the quantum of evidence as required by this Court in Jackson, supra, was not produced at his trial and, therefore, the Court of Appeals correctly granted Respondent's petition for habeas corpus relief. To properly understand the propriety of the Court of Appeals' decision, a review of Michigan law is necessary.

Under Michigan law, the elements of second-degree murder are:

> "(1) The defendant is charged with second-degree murder. He pleads not guilty to this charge.
>
> (2) To establish second-degree murder, the prosecution must prove each of the following elements beyond a reasonable doubt:
>
> (3) First, that the deceased died on or about [date], within the [location].
>
> (4) Second, that his death was caused by the defendant; that is, that [name deceased] dies as the result.
>
> (5) Third, if you find that the death was caused by

> the defendant, you must determine whether the defendant is guilty of any crime. The killing of a human being by another may be entirely innocent. It is not the act of killing itself which makes it a crime, but the state of mind which it is done.
>
> (6) [A killing is not murder if it is (justified/excused) or if it occurs under circumstances which make the killing the lesser crime of (manslaughter/ some other lesser included offense)]."
>
> Michigan Criminal Jury Instructions, CJI 16:3:01
> MCLA 750.317; MSA 28.549

The jury was also instructed that Respondent could be found guilty on an aider and abettor theory pursuant to Michigan statute which provides as follows:

> "Every person concerned in the commission of an offense, whether he directly commenced the act constituting the offense or procures, counsels, aids, or abets in its commission, may hereafter be prosecuted, indicted, tried and on conviction, shall be punished as if he had directly committed such offense."
>
> MCLA 767.39; MSA 28.979

The Michigan Supreme Court has further defined the term "aiding and abetting" in People v. Palmer, 392 Mich 370; 220 NW2d 393 (1974):

> "In criminal law, the phrase 'aiding and abetting' is used to describe all forms of assistance rendered to the perpetrator of a crime. This term comprehends all words or deeds which may support, encourage or encite the commission of a crime. It includes the actual or constructive presence of an accessory, in pre-concert with the principal, for the purpose of rendering assistance, if necessary. The amount of advice, aid or encouragement is not material if it had the effect of inducing the commission of the crime [citation omitted]."
>
> Palmer, supra at Mich 378.

Further definition of the term "aiding and abetting" has been provided by Michigan Court of Appeals decisions which require that a conviction under the statute be supported by the

following findings: (1) the principal's guilt of the charged offense; (2) that the defendant supported or encouraged the principal in the commission of the charged offense; and (3) the defendant himself entertained the reckless intent of the charged offense or knew that the principal entertained the reckless intent. People v. Davenport, 122 Mich App 159, 163-164; 332 NW2d 440 (1982) and the cases cited therein. However, mere presence, even with the knowledge that an offense is about to be committed or is being committed is not enough to make a person an aider and abettor; nor is mere mental approval, passive acquiescence or consent sufficient. People v. Burrel, 253 Mich 321, 323; 235 NW 170 (1931); People v. Turner, 125 Mich App 8, 11; 336 NW2d 217 (1983). It has been held by the Sixth Circuit that in order to sustain a conviction as an aider and abettor "the accused must take some conscience action designed to make the criminal venture succeed in order to be guilty". Fuller v. Anderson, 662 F. 2d 420, 424 (CA 6, 1981).

Considering the nature of the testimony at the trial level, it is important to realize that under Michigan law an "accessory after the fact" remains an indictable common-law offense. People v. Williams, (on remand) 117 Mich App 505, 513; 324 NW2d 70 (1982). An "accessory after the fact" is "one who, with knowledge of the others guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment". People v. Lucas, 402 Mich 302, 304; 262 NW2d 662 (1978). In Lucas, the Michigan Supreme Court held that a person may not be convicted of a crime as an aider and abettor on the basis that he was an "accessory after the fact". Lucas, supra at Mich 304.

Therefore, under Michigan law, one who merely provides assistance after the commission of the offense cannot be held criminally responsible under the aiding and abetting statute. People v. Lucas, supra; People v. Karst, 118 Mich App 34; NW

In applying the Jackson v. Virginia standard, as this Court is well aware, it is incumbent upon the Court to review the evidence in a light most favorable to the prosecution. Jackson, supra, at S. Ct. 2789. Prior to the Jackson decision, the United States Supreme Court, in the case of In re: Winship, 397 U.S. 358; 90 S. Ct. 1068; 25 L. Ed. 2d 368 (1970), held that the Fourteenth Amendment due process clause requires that all criminal convictions must be based upon proof beyond a reasonable doubt. In re: Winship, supra at S. Ct. 1072. It has been held that the Jackson standard applies regardless of whether direct or circumstantial evidence is involved in the conviction. U.S. v. Babers, 787 F. 2d 1022, 1027 (CA 6, 1985).

In the instant case, the District Court denied Respondent's Application for Writ of Habeas Corpus based upon the following evidence that was produced at trial:

> "Viewing the evidence in a light favorable to the prosecution, the Court determines that evidence was presented that (1) Petitioner [Respondent] threatened the victim 2 hours before the shooting; (2) Petitioner was seen arguing with the victim nearly immediately preceding the fatal force used by Fred Thompson, an acquaintance of Petitioner's; (3) Petitioner was with Fred Thompson 3 to 4 hours before the shooting; (4) Petitioner exhibited possible furtive actions when he walked by a Detroit police sergeant's house minutes after the incident; and (5) after the shooting, Petitioner, in a smiling and laughing manner, asked a barmaid whether she heard gunshots".
>
> Memorandum Opinion and Order Denying Respondent's Application for Writ of Habeas Corpus, Page 5.

The only two statements that the trial court could have considered to be Respondent's "threats" against the victim, were those that Elaine Peterson attributed to "all three [Respondent and the Weaver Twins]" made to the victim in the Bar, that is, "where he was going he wouldn't need a radio" and outside the Bar, that is, "if he stayed there he would never see daylight". (It should be remembered that upon cross-examination, this witness denied that any statements were made to the victim outside the San-Zu-Zee Bar when she was leaving to get her drugs.) Respondent submits, however, that those statements, if they could even be attributed to the Respondent, indicate nothing more than "mere knowledge" that the victim was to be killed. Additionally, the District Court relied upon Peterson's testimony that Respondent was arguing with the decedent in front of the Bank immediately prior to the use of fatal force by Fred Thompson. (Again, on cross-examination, this witness could not attribute any specific statement to Respondent during this alleged "argument" nor could the witness even state that Respondent was saying anything.) Respondent submits that this evidence could only be considered by a rational trier of fact as Respondent being "merely present" during the homicide. People v. Burrel, supra. The only other evidence produced of occurrences prior to the shooting that the District Court and the Respondent relied upon was that Respondent was seen with Fred Thompson approximately 3-4 hours before midnight. Certainly, it would be impossible for any rational trier of fact to infer from that fact that Respondent "aided and abetted" Thompson in the

homicide slaying of Alfred Hagwood.

There was no testimony whatsoever at the trial court that Respondent took any physical action to assist Fred Thompson in any manner in obtaining the weapon and shooting the victim. Respondent was already at the scene of the shooting prior to Thompson driving up in his automobile and coming out with the weapon. There was no testimony that Thompson was with the Respondent during the time that the "threats" were made to the victim in the Bar and immediately outside the Bar. There was no testimony that Fred Thompson was even in the San-Zu-Zee Bar on October 9 or 10, 1979. At most, the evidence of Respondent's actions taken before the use of fatal force could only be construed by any rational trier of fact to amount to "mere knowledge" and "mere presence". People v. Burrel, supra. The fact that Respondent may have approved of Fred Thompson's killing of the victim is insufficient also. Burrel, supra.

In the Fuller case, this Court affirmed the granting of a Writ of Habeas Corpus for a defendant who had been convicted as an aider and abettor to the fire-bombing of a home in which two young persons died. In affirming the decision, the Court took notice that the petitioner was merely present at the fire-bombed residence when the perpetrator of the crime committed the criminal acts. The Court stated:

> " [4] The district court correctly concluded that the evidence introduced at petitioner's trial only showed that on the morning of May 18 Fuller was present at the Turner residence along with Zerious Meadows and the other boys. The evidence showed that Fuller looked around while Meadows started the fires. But as Judge Feikens point out:

> °This suggests, as Jeffrey Coleman surmised, that the petitioner may have been acting as a lookout for Meadows. It is reasonable speculation. But could a rational jury find it to be proof beyond a reasonable doubt? No evidence was presented that the petitioner intended to burn the Turner home. The evidence that he knew that Zerious Meadows planned to do is simply too meager to support conviction.' (emphasis in original)
>
> We note that there was no evidence at trial that the °Molotov cocktail' which started the fire was prepared in advance, or, if it was, whether any of the boys other than Zerious Meadows knew that the °Molotov cocktail' existed. There was of course no evidence that any of the boys, except Fuller, participated in the manufacture of the °Molotov cocktail'.
>
> Moreover, there was no direct evidence that the youths approached the Turner house with intent to set the house on fire. Assuming Zerious Meadows had this intent, however, there was no evidence that it was shared by petitioner or the other boys.
>
> The only direct evidence supporting the State's contention that Fuller °stood guard and acted as a lookout' for Zerious Meadows was Jeffrey Coleman's testimony that over a period of several minutes Fuller turned his head from side to side °more than twice.' We agree with the district court that this is insufficient to establish beyond a reasonable doubt that Fuller took conscious action to aid Meadows' commission of arson."

Fuller, supra at 424

In the instant case, the facts are even more compelling because there was no testimony whatsoever that Respondent did anything when Fred Thompson pulled up in the car with the shotgun. Taking the evidence in a light most favorable to the prosecution, assuming that Respondent was engaged in an argument with the victim over the radio, there was still a complete absence of testimony that Respondent acted in concert, encouraged, support or in any way assisted Thompson in shooting the victim. Respondent recognizes that in order to sustain a

conviction under the aiding and abetting statute, the amount of assistance is immaterial as long as it had the effect of inducing the crime. People v. Palmer, supra at Mich 378. However, the trial record is devoid of evidence of any assistance whatsoever.

In support of its denial of Respondent's Application, the District Court also relied on two pieces of evidence that **occurred after the shooting**, that is, the actions taken on Respondent's porch in passing something inside the home and the statements made to the barmaid at the San-Zu-Zee Bar about "gunshots". Memorandum Opinion, Page 5. The prosecutors theorized that these actions taken on the porch of Respondent's home were actually the passing of the shotgun shell casings into the home in order to hide them. However, again taking the evidence in a light most favorable to the prosecution, the most that that evidence could reveal to any rational trier of fact was that Respondent was "an accessory after the fact" in hiding evidence of the shooting. People v. Williams, supra. These "possible furtive actions" as the District Court found, after the use of the fatal force, could not be used by a rational trier of fact to bootstrap the Respondent's guilt back to the principal offense. Up to that point in time, the record was void of any evidence that Respondent participated in any way to the shooting.

Finally, with respect to the conduct of Respondent in returning to the San-Zu-Zee Bar and asking Arbura Brown in a "laughing and smiling" manner if she had heard the shots, at most, assuming that Respondent was present when Thompson fired the weapon, indicates that Respondent was present and nothing else. It should be remembered that prior to returning to the

Bar, the off-duty homicide detective had asked Respondent if he had heard or saw anything to which Respondent replied that he did not see anything but he had heard shots. It is important to remember that the barmaid testified that Respondent's jovial mannerisms were characteristic of his demeanor as a whole when he visited the Bar on a frequent basis.

## I. THE SIXTH CIRCUIT PROPERLY FOUND THAT NO RATIONAL TRIER OF FACT COULD CONVICT RESPONDENT OF SECOND-DEGREE MURDER

Petitioner claims that the Sixth Circuit erroneously applied Jackson v. Virginia to the case at bar. The petition claims that the Court of Appeals "did not view the evidence in a light most favorable to the prosecution". (See Petition, Page 28) However, there is a conspicuous absence of any support of Petitioner's assertion.

The sole claim of error is Petitioner's contention that the Court of Appeals failed to attribute certain statements directly to Respondent as supported by the testimony of Elaine Faye Peterson. (See Petition, Page 28-29) However, assuming that the testimony was unequivocal that Respondent had made the alleged statements, the Sixth Circuit correctly found that the "alleged statements at the bar and on the street corner, while showing animus towards the victim, cannot be construed as providing encouragement to the principal". (See Petitioner's Appendices, Page 41a) There was a complete absence of any proof that Respondent "acted in pre-concert with Thompson to commit the murder". (See Petitioner's Appendices, Page 40a) Accordingly, the Court of Appeals found that the evidence was insufficient to

convince any rational trier of fact that Respondent was an aider and abettor in a second-degree murder.

## II. FEDERAL HABEAS CORPUS REVIEW UNDER JACKSON v. VIRGINIA DOES NOT INTERFERE WITH ANY STATE COURT PROCEEDINGS

Petitioner contends that this Court should reconsider Jackson v. Virginia because of the decision's "unwarranted interference with state court proceedings". (See Petition, Page 1) Although Petition makes this claim, he fails to support it with any argument or authority whatsoever. And, indeed, he could not because with any habeas corpus review by the federal court, both case law and statutory requirement mandate that ongoing state proceedings not be disrupted. Justice Stevens succinctly stated the disposition in his concurring opinion in Justices of Boston Municipal Court v. Lydon, 466 U.S. 294; 104 S. Ct. 1805; 80 L. Ed 2d 311 (1984):

> "This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power. Francis v. Henderson, 425 U.S. 536, 539; 96 S. Ct. 1708, 1710; 48 L. Ed. 2d 149 (1976). For example, we have held that federal courts should not exercise habeas jurisdiction when the petitioner has failed to comply with state simultaneous objection rules, because of the weighty state interests underlying enforcement of such rules. See Engle v. Isaac, 456 U.S. 107; 102 S. Ct. 1558; 71 L. Ed. 2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72; 97 S. Ct. 2497; 53 L. Ed. 2d 594 (1977).
>
> One of the weightiest of state interests is that favoring speedy, efficient, and uninterrupted disposition of criminal cases. Because of this critical state interest, we have held that federal courts should abstain from exercising their jurisdiction when the effect thereof would be to disrupt ongoing state proceedings. See, e.g., Hicks v. Miranda, 422 U.S. 332, 349; 95 S. Ct. 2281, 2291; 45 L. Ed. 2d 223 (1975); Huffman v. Pursue, Ltd., 420 U.S.

592, 599-601; 95 S. Ct. 1200, 1205-1207; 43 L. Ed. 2d 482 (1975); Perez v. Ledesma, 401 U.S. 82, 84-85; 91 S. Ct. 674, 676-677; 27 L. Ed. 2d 701 (1971); Younger v. Harris, 401 U.S. 37, 41-45; 91 S. Ct. 746, 749-751; 27 L. Ed. 2d 699 (1971).

> Similarly, the statutory exhaustion requirement found in the habeas statute, 28 U.S.C. § 2254, reflects a recognition that federal habeas courts should not disrupt ongoing state proceedings. See Rose v. Lundy, 455 U.S. 509, 518; 102 S. Ct. 1198, 1203; 71 L. Ed. 2d 379 (1982). Indeed, in our leading case concerning the propriety of pretrial federal habeas intervention under the exhaustion doctrine, we cautioned that such review would be inappropriate when it threatens to disrupt pending state proceedings and orderly state processes. See Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490-493; 98 S. Ct. 1123, 1127-1129; 35 L. Ed. 2d 443 (1973). Thus, the habeas statute itself reflects this concern with disrupting ongoing state proceedings.
>
> Justices of Boston, supra at S. Ct. 1826

Accordingly, Petitioner's claim that habeas corpus review in accordance with Jackson v. Virginia, interferes with state proceedings is without merit. The decision of the Sixth Circuit Court of Appeals correctly held that Respondent was entitled to habeas corpus relief.

## III. FEDERAL HABEAS CORPUS REVIEW UNDER JACKSON v. VIRGINIA IS MANDATED BY THE FOURTEENTH AMENDMENT, U.S. CONSTITUTION

Petitioner contends that the holding of Jackson v. Virginia should be re-examined because of it being an "unwarranted burden on the federal court". (See Petition, Page 12) The Petition seems to suggest that the state court criminal proceedings which encompass standards defining when a criminal case lacks sufficient evidence for jury consideration is all that is necessary to insure the propriety of a criminal conviction. Respondent submits, however, that if this was, in fact,

sufficient, then Congress would not have enacted 28 U.S.C. § 2254 in the first place.

This Court is well aware that a habeas corpus petition challenging the sufficiency of the evidence in accordance with Jackson v. Virginia is but one criteria for relief pursuant to 28 U.S.C. § 2254. There are at least seven (7) other independent grounds for a federal court's determination in reviewing the propriety of a state court conviction. 28 U.S.C. § 2254(d)(1)-(7). Since Congress enacted the statute allowing persons in custody pursuant to state court convictions to petition federal court for relief, the fact that additional work has been imposed on the federal judiciary is not sufficient cause to limit the mandates of the United States Constitution. Congress' intention is embodied in the statute and, accordingly, it is the duty of the courts to perform a necessary function to a free society. In Jackson v. Virginia, Justice Stewart, writing for the majority, stated:

> "...but Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state post-conviction remedies to redress possible error. See 28 U.S.C. 2254(b)(d). What it does not presume is that the these state proceedings will always be without error in the constitutional sense. The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur--reflecting as it does the belief that the 'finality' of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right--is not one that can be so lightly abjured."
>
> Jackson, supra at 99 S. Ct. 2791

## F. CONCLUSION

WHEREFORE, Respondent JONATHON HOPSON, prays that this Honorable Court, in light of the foregoing argument and authority, dismiss Petitioner's Petition for Writ of Certiorari or, in the alternative, deny all relief requested therein.

Respectfully submitted,

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